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## 2 A Trade Negotiator's Perspective of the Links between Trade and Environmental Policies

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### **Introduction**

The issue of the relationship between international trade and the environment has received significant public attention in recent years. Some have expressed concern that the multilateral trade rules of the WTO may place inappropriate constraints on the ability of governments to respond to environmental problems. A key focus for some of these concerns have been several GATT or WTO disputes particularly the tuna/dolphin and shrimp/turtle cases. Others have expressed concern that new and emerging environmental measures may adversely affect market access opportunities and erode some of the benefits expected from the WTO.

It would be a mistake to think that environmental concerns are a totally new issue for the multilateral trading system. When the General Agreement on Tariffs and Trade (GATT) was first drawn up there was explicit recognition of the potential intersection between trade policy and a range of other important public policies. The general exceptions provision of Article XX of the GATT was designed to ensure that GATT disciplines would not prevent countries from continuing to give priority to these other public policy objectives.

Policy objectives identified in Article XX that are clearly relevant to the environment are XX(b), covering measures necessary to protect human, animal or plant life or health, and XX(g), covering measures relating to the conservation of exhaustible natural resources. Article XX states that nothing in the GATT shall be construed to prevent the adoption of such measures subject to compliance with a number of safeguards to prevent the abuse of this provision.

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However, the issues posed by today's trade and environment debate are much broader and more complex than when the GATT was negotiated some fifty years ago. In part, this change is a reflection of the higher profile which environmental issues have assumed in public policy making in the last twenty-five years. There have been considerable developments in environmental policy making at both the domestic and international levels, involving an expansion in the activities affected by these policies and in the range of policy tools used. This has implications for the multilateral trading system, whether directly through the use of trade or trade-related measures for environmental purposes or indirectly through possible impacts of environmental policy on the structure, scale, intensity and location of economic activity.

The greater breadth and complexity of today's trade and environment debate is also a reflection of the expansion in the reach of the multilateral trade disciplines, especially in the Tokyo and Uruguay Round negotiations. One of the significant features of the WTO is the greater detail of its disciplines in traditional areas of trade policy rule making, and the range of domestic policy areas which are touched by its disciplines. In particular, there are its rules on technical standards and regulations, sanitary and phytosanitary measures, subsidies, agricultural support, trade in services and trade-related intellectual property rights. There are references to the environment in all of the WTO agreements covering these issues. This extension in the sphere of interest of the trade community is a response to a number of developments. These include the greater impingement of some non-trade policy areas on trade and the increased importance of non-tariff and domestic barriers to trade as tariffs have been reduced through successive rounds of trade negotiations.

It is important, therefore, to recognise that the trade and environment debate is a product of developments in both environmental and trade policy. However, there is another dimension to the current trade and environment debate. This is to be found in fundamental changes in the conceptual understanding of the relationship between economic activity and the environment, and in the relationship between environmental policy, development policy and trade policy. The change in conceptual understanding was most strikingly represented by the introduction of the concept of "sustainable development" into policy debate, especially with the Brundtland Report in 1987.

The international community's increasing acceptance of the notion of sustainable development was part of the international context to the Uruguay Round negotiations. The objectives of the WTO, as set out in the preamble to the Marrakesh Agreement Establishing the WTO, are largely based on those of the GATT. But, significantly, these have been modified to make direct reference to the objective of sustainable development and the need to protect and preserve the



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environment. The objectives of the WTO also recognise the need for positive efforts to ensure that developing countries, and especially the least developed, secure a share of the growth in international trade in proportion to their economic development needs.

In line with this recognition of the objective of promoting sustainable development, the Marrakesh Ministerial Meeting which concluded the Uruguay Round agreed that the WTO should initiate a work program on trade and environment. This paper firstly provides an overview of the issues included in this work program and progress in the WTO's consideration of them. It then briefly examines two of these issues: the relationship between the WTO's disciplines and the use of trade measures in multilateral environmental agreements (MEAs); and the interaction between trade liberalization and the environment. Finally, the paper summarises key issues involved in the tuna/dolphin and shrimp/turtle dispute settlement cases.

## **An Overview of the WTO's Work on Trade and Environment**

The 'Decision on Trade and Environment' agreed by Ministers at Marrakesh echoed chapter 2 of Agenda 21 in its emphasis on 'making international trade and environment mutually supportive'. It provided for the WTO to establish a Committee on Trade and Environment (CTE) to carry out an analytical work program and to make recommendations on whether any modifications are needed to the WTO rules to enhance positive interaction between trade and environmental measures and avoid protectionist trade measures.

Some ten issues were identified in the CTE's work program. Key issues included:

- the relationship between the WTO rules and the use of trade measures for environmental purposes, including measures taken pursuant to multilateral environment agreements (item 1 of the work program)
- the relationship between the WTO rules and environmental measures which may affect trade, including eco-labelling, packaging and recycling requirements (item 3)
- the effects of environmental measures on market access (item 6)
- the environmental benefits of removing trade restrictions and distortions (also item 6).

The CTE presented a major report on progress in its consideration of the ten items to the WTO's first Ministerial Conference held in Singapore in December 1996.



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The report summarised the state of debate in the Committee, including some areas where there were marked divergences in views. Since 1996 the focus of the CTE's work has been on improving its analytical understanding of the issues on its work program, as well as on improving dialogue with MEAs and on supporting outreach activities by the WTO. The WTO Secretariat has organized symposiums on trade, environment and sustainable development in May 1997 and March 1998 involving a wide range of business, environment, and development NGOs as well as WTO Members. The symposiums, which built on an earlier symposium in 1994, have provided a forum for Members to contribute to a more informed public debate on trade and environment issues and to receive input from the NGO community.

An important part of the CTE's work has been examination of the trade implications of a range of policies and mechanisms which have emerged in response to environmental problems and which may impact on market access. These include environmental taxes and charges, eco-labelling, packaging and recycling programs.

Much of the focus has been on eco-labelling, which is recognised as offering potential to inform consumers about the environmental impacts through the life-cycle of products. As this means changing consumption and production the trade impacting potential of these schemes is under scrutiny.

A key issue has been exploring ways to promote best design principles that will minimise the creation of ineffective, counter-productive or protectionist eco-labelling schemes. Principles discussed include: the need for transparency, adequate consultation processes, consideration of market and trade impacts, the special needs of developing countries, sufficient allowance for adaptation, harmonization of standards, scientific and technical evidence, and acceptance of equivalency and mutual recognition

The most recent development in the WTO on trade and environment is the proposal by the European Community and the United States for a High Level Meeting (HLM) on trade and environment to provide direction for the WTO's future work in this area. While the proposal is still under discussion, it appears likely that the HLM will be held in the first half of 1999 and that its focus will be on promoting improved dialogue between the trade and environment communities. It is envisaged that the meeting would involve NGOs, building on the format and experience already gained from the Secretariat-held symposiums.



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## The Use of Trade Measures in Multilateral Environmental Agreements

MEAs have been negotiated to address a wide range of environmental issues. Most MEAs do not contain trade provisions. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is one MEA which does contain trade provisions and it has co-existed with the multilateral trading system since 1975 without apparent problems. However, the important role of trade measures in some MEAs, and the significant economic implications of some other MEA negotiations, have led to greater interest in the relationship between the WTO and the use of trade measures to meet MEA obligations. A key concern on the part of the trade community has been to ensure that trade and economic considerations are fully taken into account in significant environment negotiations such as those on climate change and a biosafety protocol.

Some WTO Members have proposed changes to the WTO rules to explicitly identify situations in which trade measures taken pursuant to an MEA would be considered WTO-compatible. Some have suggested that this could involve the development of criteria or principles to help identify when trade measures may be appropriate. Suggested principles include: the necessity of the trade measure for achieving the MEA's objectives; its effectiveness; and whether it is the least trade restrictive measure available.

The CTE's report to the Singapore Ministerial Conference noted that views differed on whether any modifications to the WTO rules were required to address this issue. However, the report set out a framework for further consideration which:

- highlights Principle 12 of the Rio Declaration on Environment and Development on avoiding unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country;
- emphasises the complementarity between the work of the WTO in seeking cooperative multilateral solutions to trade concerns and multilateral cooperation to tackle transboundary and global environmental problems;
- points out that trade measures have been included in a relatively small number of MEAs, that to date there have been no GATT or WTO dispute about such measures, and that a range of provisions in the WTO including Article XX of GATT 1994 can accommodate the use of such measures;
- calls for particular care to be taken over any consideration of applying trade measures to non-parties in the negotiation of future MEAs;
- stresses the importance of policy coordination at the national level in reducing the possibility of legal inconsistencies arising.



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While discussion in the CTE has continued on proposals for possible changes to the WTO rules in relation to the MEA issue, the current focus is on improving dialogue between the trade and environment communities. At CTE meetings in September 1997 and July 1998 a broad range of MEA Secretariats have been invited to report on developments in their respective MEAs and environmental negotiations, and to hear views from WTO delegations. These information sessions have helped ensure that trade officials are aware of MEA negotiations and that MEA Secretariats can assist their policy bodies take account of concerns from a WTO perspective. The success of this initiative will, however, critically depend on the extent to which it contributes to enhanced coordination among relevant ministries at the national level to ensure that negotiating positions in both trade and environmental fora represent whole of government positions.

## **The Interaction between Trade Liberalization and the Environment**

The relationship between trade liberalization and the environment has received considerable attention in the CTE's work. In part this reflects recognition of public interest in the subject and the need to be seen to be addressing concerns about the potential environmental impacts of trade liberalization if public support for the work of the WTO is to be maintained. But there is also interest on the part of many WTO delegations in the potential to identify "win-win" opportunities by which trade reform could contribute to both trade and environment benefits.

The CTE's 1996 report highlighted the close link between poverty and environmental degradation and the role that trade can play in assisting in the eradication of poverty. The report pointed to the potential contribution of trade liberalization in facilitating a more efficient allocation and use of resources, and in providing resources to support countries in their efforts to promote sustainable development. The importance of implementing appropriate environmental policies at the national level was emphasised to ensure that the benefits of trade liberalization are realized and trade-induced growth will be sustainable. The report also noted the inappropriateness of relaxing existing national environmental standards or their enforcement in order to promote trade, while recognizing that governments have the right to establish their national environmental standards in accordance with their respective environmental and developmental conditions, needs and priorities.

During 1997 and 1998 the CTE has concentrated on exploring these themes in relation to a range of sectors, including agriculture, forestry, fishing, energy, textiles and clothing and environmental services. A major focus for the CTE's discussions



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has been the role of subsidies and market access barriers in stimulating high levels of resource use and wasteful processes, particularly in sectors like agriculture, fishing and energy. Another key area for consideration has been the extent to which tariff peaks and tariff escalation in export markets may limit the ability of primary producing countries to diversify their economic structures. It has been argued that such diversification may reduce pressures to earn needed foreign exchange through increased exploitation of the nature resource base.

A major area where there are diverging views is in relation to arguments about the multifunctionality of agricultural production, and the potential environmental benefits of some subsidy policies. CTE discussions have recognized concerns that trade liberalization and increased economic growth might exacerbate environmental problems in some circumstances. Many delegations have emphasised the need to address these concerns through targeted environmental policies and not by foregoing the benefits of enhanced trading opportunities.

## **GATT/WTO Disputes**

There have been only a handful of disputes in the GATT or WTO concerning the use of trade measures for environmental purposes. However, several of these have attracted considerable public attention and have formed the basis for claims that these agreements are do not adequately cater for environmental considerations.

A major focus of attention has been the two GATT dispute settlement panels which concluded in 1991 and 1994 that a U.S. ban on imports of certain imports of yellowfin tuna designed to reduce incidental kill of dolphins was in violation of GATT obligations. The U.S. measure banned the import of yellowfin tuna harvested with purse-seine nets in the Eastern Tropical Pacific Ocean unless U.S. authorities certified that the government of the harvesting country had a program regulating taking of marine mammals that was comparable to that of the United States. In addition, U.S. authorities had to certify that the average rate of incidental taking of marine mammals was comparable to the average rate for U.S. vessels.

Both panels found that the U.S. measure was an import prohibition inconsistent with Article XI of the GATT and could not be justified by the general exceptions provision of Article XX. The reasoning adopted by the two panels in relation to Article XX differed in a number of respects. An important consideration was the fact that the U.S. measure posed unpredictable conditions on exporters that could not be regarded as necessary to, or primarily aimed at, the protection of dolphins. Specifically, the exporting country could not know in advance whether its policies met the U.S. requirements as the latter required the exporting country to have the



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same incidental taking rate as actually recorded by the U.S. for the period concerned.

However, a broader consideration for both panels was the fact that the U.S. measure imposed trade restrictions based on the fact that the governments of exporting countries followed different environmental policies. Both panels concluded that Article XX did not justify such a measure. The second panel emphasised that the dispute was not about the validity of the U.S. environmental objective but its use of a trade embargo to secure changes in the policies pursued by other GATT contracting parties in their own jurisdiction.

Neither of the panel reports were adopted by GATT Council due to U.S. opposition.

It is likely that the prominence of the trade and environment issue in the WTO will be significantly increased in the light of the recent outcome to the dispute settlement action taken by India, Pakistan, Thailand and Malaysia over a U.S. ban on shrimp imports. The dispute centred on the U.S. ban on imports of shrimp from countries that did not have a national regulatory program in place requiring the use of turtle excluder devices (TEDs) in shrimping vessels. The U.S. measure was found to be a violation of its WTO obligations by the panel which examined the case. The U.S. appealed this finding to the WTO's Appellate Body which found that the panel made a number of errors in its legal reasoning, but also concluded that the U.S. measure was not in conformity with WTO provisions.

There will be a major challenge to the WTO and its Members to promote a balanced public debate on these findings. A fundamental point is that the findings by the WTO's Appellate Body do not call into question the legitimacy or importance of the environmental objectives of the United States in conserving sea turtles. Indeed, they confirmed the ability of Article XX of the GATT 1994 to accommodate such objectives in finding that the U.S. measure related to the conservation of an exhaustible natural resource as required by Article XX(g).

However, the findings highlighted major concerns about the means by which the United States sought to advance these objectives which should be of concern to both the trade and environment communities. The Appellate Body concluded that the U.S. measure was applied in a manner that constituted arbitrary and unjustifiable discrimination and therefore did not meet the requirements of the chapeau of Article XX.

In particular, the findings focus on the fact that the United States engaged in a unilateral and non-consensual procedure in its resort to an import ban rather than seeking to work through cooperative and diplomatic approaches to other countries. Further, the U.S. measure did not provide any flexibility to consider the



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appropriateness of the different conservation programs that might be followed in exporting countries. Its process for certifying countries to continue to export to the United States was not transparent or predictable and denied basic fairness and due process to countries whose applications for certification were rejected.

## **Concluding Comments**

The WTO has a comprehensive work program on trade and environment activities encompassing a range of complex issues. It would be illusory to think that there are simple solutions waiting to be found to address these issues and the WTO's work in this area will continue to have a major analytical focus. There appears to be strong support from a broad range of WTO Members for the CTE's work and agreement that trade and environment will continue to be an important issue for the WTO.

Three considerations are likely to shape much of the WTO's future work on trade and environment. The first is the need for enhanced coordination at the national and international levels on trade and environment issues, including the need to ensure that trade, economic and environmental considerations are all taken into account in both environmental and trade negotiations. The proposed high level meeting may provide an important vehicle for progressing this objective.

A second consideration is the extent to which the trade and environment debate can feed into and support future trade negotiations in areas like agriculture where there may be opportunities for "win-win" outcomes. There may be a significant role for the CTE in this regard, both in its own examination of the issues and as a catalyst for further research and analysis in other international fora.

A third consideration is the fact that trade and environment is likely to continue to be one of the key components of the public image of the WTO and an important influence in shaping public perceptions of the value and impact of trade liberalization. This suggests a continuing role for the WTO in contributing to informed public debate about the issues, including in relation to disputes such as the shrimp/turtle case, and a need to demonstrate that it is making a constructive contribution to international efforts to promote sustainable development.